Gannett Co., Inc., d/b/a The News Journal Company *and* The Newspaper Guild of Greater Philadelphia, Local No. 10 a/w The Newspaper Guild, AFL–CIO–CLC. Case 4–CA–26797

August 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 18, 2000, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions and a supporting brief which the Charging Party joined. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

ORDER

The complaint is dismissed.

Margaret M. McGovern, Esq., and *Anne C. Ritterspach, Esq*., for the General Counsel.

Joyce T. Bailey, Esq., of Arlington, Virginia, for the Respondent-Employer.

Laurence M. Goodman, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on October 27, 1999, in Philadelphia, Pennsylvania, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 4 of the National Labor Relations Board (the Board) on August 27, 1998. The complaint, based on an original and amended charge filed by The Newspaper Guild of Greater Philadelphia, Local 10 a/w The Newspaper Guild, AFL–CIO–CLC (the Charging Party or the Union), alleges that Gannett Co., Inc., d/b/a The News Journal Company (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (5) of the National Relations Act (the Act).[1] The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that about July 1997,[2] Respondent discontinued its practice of considering and, when appropriate, granting wage increases to the editorial unit employees on successful completion of their 90-day probationary periods.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the publishing and distribution of publications, with a place of business in New Castle, Delaware, where it derived gross revenues in excess of $200,000 during the past year and held membership in or subscribed to various interstate news services, including the Associated Press. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On December 14, 1989, the Union was certified as the exclusive collective-bargaining representative of the editorial unit. Since that time, the parties have been operating without a collective-bargaining agreement. However, since at least 1995, they have been engaged in negotiations to reach an agreement. Since October 1997, Jane Amari has been Respondent's executive editor and is responsible for all personnel related decisions of the approximately 150 employees on the editorial staff. This includes all hiring decisions, reviewing performance appraisals written by first-line supervisors, and determining whether employees should receive pay increases after completing their 90-day probationary periods. In order to assist Amari in finalizing performance appraisals and salary decisions, a manager's wage and salary administration guide is followed (R. Exh. 2). It details the procedure for conducting performance appraisals and, at section 4.4, merit increases, states in pertinent part that "Employees should not expect automatic increases and should not expect 12 month increases unless their accomplishments justify it."

B. Discussion and Analysis

The General Counsel asserts in paragraph 6 of the complaint that Respondent maintained a practice that employees who

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's decision, Member Fox and Member Liebman note that significantly more employees with satisfactory ratings at the end of their probationary period received raises from 1993 through September 1997 than received them from October 1997 through 1999. In some cases, a numerical showing is sufficient to establish a discontinuation of past practice and, hence, a violation. *Electrical South, Inc.,* 327 NLRB 270 (1998). Here, however, the Respondent adduced evidence, which was credited by the judge, that the decision to award post-probationary merit wage increases was highly subjective and depended on numerous criteria, including budget, skill, and area of specialty, and the General Counsel failed to show that executive editors who approved those raises prior to October 1997 applied different criteria than current Executive Editor Jane Amari in determining whether to give merit increases.

[1] The Regional Director consolidated Case 4–CA–26670 with the subject case. After the opening of the hearing, the parties entered into an informal Board settlement with the posting of a notice, which I approved on the record subject to compliance with its terms and conditions (Jt. Exh. 3). Likewise, I approved the General Counsel's motion to sever that case from the subject case. Therefore, this decision will only address the issues in Case 4–CA–26797.

[2] All dates are in 1997 unless otherwise indicated.

performed at a satisfactory level or higher routinely received wage increases after completion of their 90-day probationary periods. In or about July 1997, the practice was discontinued and a number of employees did not receive a wage increase after the completion of their 90-day probationary periods. The General Counsel opines that the Respondent engaged in this conduct without notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct.

Respondent contends that no firm practice ever existed that editorial employees automatically receive wage increases after completion of their 90-day probationary periods. Rather, it is discretionary, subject to an independent review of the executive editor as to whether individual employees are eligible to receive wage increases.

The evidence discloses that first-line supervisors prepare a performance evaluation after employees complete their first 90 days of employment and award a score from 1 through 5 on the rating system with 3 to 3.5 being average. On occasions, the first-line supervisor will recommend that a wage increase is appropriate. The executive editor then reviews all of the employee performance appraisals and makes an independent decision as to whether a wage increase is warranted. The parties' submitted an exhibit that depicts the history of wage increases for employees in the editorial department who completed their 90-day probationary periods from May 1994 to May 1999 (Jt. Exh. 1). That document conclusively shows that three employees,' who completed their 90-day probationary periods from May 1994 to the end of June 1997, did not receive a wage increase. Likewise, the document establishes that between July 1997 and May 1999, 17 employees received wage increases while 28 employees did not receive wage increases despite being rated satisfactory or higher after completing their 90-day probationary periods.

Both Executive Editor Amari and former Executive Editor Bennie Ivory (September 1995 to June 1997) credibly testified that the decision to grant wage increases to employees after completion of their 90-day probationary periods is not automatic. Rather, it is within the exclusive discretion of the executive editor, and is based on a number of factors including budget considerations, the evaluation of the employee's performance, the amount of money the employee is currently earning, and whether granting a wage increase might be a factor in retaining an individual on the staff. For example, Amari testified that although employee Hurlock was rated outstanding after completing his 90-day probationary period, he was not given a wage increase because he was a part-time sports clerk. Subsequently, Hurlock was hired as a full-time employee.

The Board previously held in *Oneita Knitting Mills,* 205 NLRB 500 fn. 1 (1973), that "An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer . . . exercise his discretion with respect to such increases, once an exclusive bargaining representative is selected. *NLRB v. Katz,* [369] U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program; however, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." The Board further addressed the issue of a respondent discontinuing the practice of granting merit increases to employees after they successfully completed a 90-day probationary period in *Dynatron/Bondo Corp.,* 323 NLRB 1263 (1997). In that case, while finding a violation of the Act when the employer totally discontinued giving merit increases to employees, the Board principally relied on a number of factors including that merit was the sole fixed criterion for granting the raise, the timing of granting the raise was consistent, the amount of the raise fell within a narrow range, the majority of employees received the raises, and the increase had been granted over a significant period of time.

In stark contrast, the merit increases in the subject case have not been totally discontinued. Additionally, other factors beside merit are utilized in determining whether a merit increase is awarded and the dollar amount of the increase ranges from 100 percent to zero rather then remaining in a narrow range.

Based on the forgoing, I am not convinced that an established practice was in effect that employees automatically received wage increases if they were rated satisfactory or higher after completion of their 90-day probationary periods. Indeed, the evidence establishes that both before and after July 1997, a number of employees did not receive wage increases after completion of their 90-day probationary periods. Likewise, the record discloses that during the same period, a number of employees did receive wage increases after completion of their 90-day probationary periods. Thus, as required under *Oneita Knitting Mills,* the Respondent here maintained its existing practice of using a number of factors including the discretion of the executive editor in determining whether a merit increase was given to employees after completion of the 90-day probationary period. Accordingly, it follows that if there was no change in past practice in July 1997, Respondent was not required to notify or bargain with the Union. Under these circumstances, I find that since there was no change in the practice of granting wage increases to employees after completion of their 90-day probationary periods, Respondent did not violate Section 8(a)(1) and (5) of the Act. See *Selkirk Metalbestos*, 321 NLRB 44 (1996); *Haddon Craftsmen,* 297 NLRB 462 (1989).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not engage in violations of Section 8(a)(1) and (5) of the Act by discontinuing its practice of granting wage increases to employees after successful completion of their 90-day probationary periods.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.